

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

MALINDA J. GALBRAITH,)	
)	No. CV-07-0373-JPH
Plaintiff,)	
)	ORDER GRANTING DEFENDANT'S
v.)	MOTION FOR SUMMARY JUDGMENT
)	
MICHAEL J. ASTRUE,)	
Commissioner of Social)	
Security,)	
)	
Defendant.)	
)	

BEFORE THE COURT are cross-motions for summary judgment, noted for hearing without oral argument on June 2, 2008. (Ct. Rec. 13, 17). Attorney Lora Lee Stover represents Plaintiff Malinda J. Galbraith ("Plaintiff"); Special Assistant United States Attorney Carol A. Hoch represents the Commissioner of Social Security ("Commissioner"). The parties have filed a consent to proceed before a magistrate judge. (Ct. Rec. 7). After reviewing the administrative record and the briefs filed by the parties, the Court **GRANTS** Defendant's Motion for Summary Judgment (Ct. Rec. 17) and **DENIES** Plaintiff's Motion for Summary Judgment (Ct. Rec. 13).

JURISDICTION

On December 10, 2004, Plaintiff filed a an application for Disability Insurance Benefits ("DIB") and an application for Supplemental Security Income ("SSI") benefits, alleging disability

1 since April 1, 2002. (AR 21, 64-68). Plaintiff's applications
2 were denied initially and on reconsideration. An administrative
3 hearing was held before Administrative Law Judge ("ALJ") Richard
4 A. Say on March 8, 2007. (AR 293-330). On June 25, 2007, the ALJ
5 issued a decision finding that Plaintiff was not disabled. (AR
6 21-30). On October 26, 2007, the Appeals Council denied
7 Plaintiff's request for review. (AR 4-6). Therefore, the ALJ's
8 decision became the final decision of the Commissioner, which is
9 appealable to the district court pursuant to 42 U.S.C. § 405(g).
10 Plaintiff filed an action for judicial review pursuant to 42
11 U.S.C. § 405(g) on November 21, 2007. (Ct. Rec. 1).

12 STATEMENT OF FACTS

13 The facts have been presented in the administrative hearing
14 transcript, the ALJ's decision, the briefs of both Plaintiff and
15 the Commissioner and will only be summarized here. Plaintiff was
16 35 years old on the date of the ALJ's decision. (AR 26).
17 Plaintiff completed the seventh grade in school and has past work
18 as a kitchen helper/dishwasher and as a food wrapper. (AR 94-101,
19 306-307, 323). Plaintiff indicated that she became disabled on
20 April 1, 2002, because she could not "physically, mentally or
21 emotionally maintain like a civil human" (AR 309). She
22 stated that she only had the mentality to be able to handle being
23 a stay at home mom. (AR 309).

24 Plaintiff testified that she lived in a house with the father
25 of her third child, her twelve-year-old daughter, two dogs, two
26 cats and, at the time of the administrative hearing, 12 puppies.
27 (AR 307-308, 314). She stated that she could read, write and do
28 simple math. (AR 308). She indicated that she had not worked

1 since leaving her last job after being sexually harassed. (AR
2 310). With respect to drug use, Plaintiff testified that she had
3 not used marijuana on a regular everyday basis since completing
4 treatment three years prior to the hearing; however, she indicated
5 that she had continued to infrequently use marijuana. (AR 316).
6 Plaintiff stated that she has been charged with domestic violence
7 once in the past four years and has twice been ordered by the
8 court to attend anger management classes. (AR 320-321).

9 **SEQUENTIAL EVALUATION PROCESS**

10 The Social Security Act (the "Act") defines "disability" as
11 the "inability to engage in any substantial gainful activity by
12 reason of any medically determinable physical or mental impairment
13 which can be expected to result in death or which has lasted or
14 can be expected to last for a continuous period of not less than
15 twelve months." 42 U.S.C. §§ 423(d)(1)(A), 1382c(a)(3)(A). The
16 Act also provides that a Plaintiff shall be determined to be under
17 a disability only if his impairments are of such severity that
18 Plaintiff is not only unable to do his previous work but cannot,
19 considering Plaintiff's age, education and work experiences,
20 engage in any other substantial gainful work which exists in the
21 national economy. 42 U.S.C. §§ 423(d)(2)(A), 1382c(a)(3)(B).
22 Thus, the definition of disability consists of both medical and
23 vocational components. *Edlund v. Massanari*, 253 F.3d 1152, 1156
24 (9th Cir. 2001).

25 The Commissioner has established a five-step sequential
26 evaluation process for determining whether a person is disabled.
27 20 C.F.R. §§ 404.1520, 416.920. Step one determines if he is
28 engaged in substantial gainful activities. If he is, benefits are

1 denied. 20 C.F.R. §§ 404.1520(b), 416.920(b). If he is not, the
2 decision maker proceeds to step two, which determines whether
3 Plaintiff has a medically severe impairment or combination of
4 impairments. 20 C.F.R. §§ 404.1520(c), 416.920(c).

5 If Plaintiff does not have a severe impairment or combination
6 of impairments, the disability claim is denied. If the impairment
7 is severe, the evaluation proceeds to the third step, which
8 compares Plaintiff's impairment with a number of listed
9 impairments acknowledged by the Commissioner to be so severe as to
10 preclude substantial gainful activity. 20 C.F.R. §§ 404.1520(d),
11 416.920(d); 20 C.F.R. § 404 Subpt. P App. 1. If the impairment
12 meets or equals one of the listed impairments, Plaintiff is
13 conclusively presumed to be disabled. If the impairment is not
14 one conclusively presumed to be disabling, the evaluation proceeds
15 to the fourth step, which determines whether the impairment
16 prevents Plaintiff from performing work he has performed in the
17 past. If Plaintiff is able to perform his previous work, he is
18 not disabled. 20 C.F.R. §§ 404.1520(e), 416.920(e). If Plaintiff
19 cannot perform this work, the fifth and final step in the process
20 determines whether Plaintiff is able to perform other work in the
21 national economy in view of his residual functional capacity and
22 his age, education and past work experience. 20 C.F.R. §§
23 404.1520(f), 416.920(f); *Bowen v. Yuckert*, 482 U.S. 137 (1987).

24 The initial burden of proof rests upon Plaintiff to establish
25 a *prima facie* case of entitlement to disability benefits.
26 *Rhinehart v. Finch*, 438 F.2d 920, 921 (9th Cir. 1971); *Meanel v.*
27 *Apfel*, 172 F.3d 1111, 1113 (9th Cir. 1999). The initial burden is
28 met once Plaintiff establishes that a physical or mental

1 impairment prevents him from engaging in his previous occupation.
2 The burden then shifts to the Commissioner to show (1) that
3 Plaintiff can perform other substantial gainful activity and (2)
4 that a "significant number of jobs exist in the national economy"
5 which Plaintiff can perform. *Kail v. Heckler*, 722 F.2d 1496, 1498
6 (9th Cir. 1984).

7 STANDARD OF REVIEW

8 Congress has provided a limited scope of judicial review of a
9 Commissioner's decision. 42 U.S.C. § 405(g). A court must uphold
10 the Commissioner's decision, made through an ALJ, when the
11 determination is not based on legal error and is supported by
12 substantial evidence. *See Jones v. Heckler*, 760 F.2d 993, 995
13 (9th Cir. 1985); *Tackett v. Apfel*, 180 F.3d 1094, 1097 (9th Cir.
14 1999). "The [Commissioner's] determination that a plaintiff is
15 not disabled will be upheld if the findings of fact are supported
16 by substantial evidence." *Delgado v. Heckler*, 722 F.2d 570, 572
17 (9th Cir. 1983) (*citing* 42 U.S.C. § 405(g)). Substantial evidence
18 is more than a mere scintilla, *Sorenson v. Weinberger*, 514 F.2d
19 1112, 1119 n.10 (9th Cir. 1975), but less than a preponderance.
20 *McAllister v. Sullivan*, 888 F.2d 599, 601-602 (9th Cir. 1989);
21 *Desrosiers v. Secretary of Health and Human Services*, 846 F.2d
22 573, 576 (9th Cir. 1988). Substantial evidence "means such
23 evidence as a reasonable mind might accept as adequate to support
24 a conclusion." *Richardson v. Perales*, 402 U.S. 389, 401 (1971)
25 (citations omitted). "[S]uch inferences and conclusions as the
26 [Commissioner] may reasonably draw from the evidence" will also be
27 upheld. *Mark v. Celebrezze*, 348 F.2d 289, 293 (9th Cir. 1965).
28 On review, the court considers the record as a whole, not just the

1 evidence supporting the decision of the Commissioner. *Weetman v.*
2 *Sullivan*, 877 F.2d 20, 22 (9th Cir. 1989) (quoting *Kornock v.*
3 *Harris*, 648 F.2d 525, 526 (9th Cir. 1980)).

4 It is the role of the trier of fact, not this court, to
5 resolve conflicts in evidence. *Richardson*, 402 U.S. at 400. If
6 evidence supports more than one rational interpretation, the court
7 may not substitute its judgment for that of the Commissioner.
8 *Tackett*, 180 F.3d at 1097; *Allen v. Heckler*, 749 F.2d 577, 579
9 (9th Cir. 1984). Nevertheless, a decision supported by
10 substantial evidence will still be set aside if the proper legal
11 standards were not applied in weighing the evidence and making the
12 decision. *Brawner v. Secretary of Health and Human Services*, 839
13 F.2d 432, 433 (9th Cir. 1988). Thus, if there is substantial
14 evidence to support the administrative findings, or if there is
15 conflicting evidence that will support a finding of either
16 disability or nondisability, the finding of the Commissioner is
17 conclusive. *Sprague v. Bowen*, 812 F.2d 1226, 1229-1230 (9th Cir.
18 1987).

19 ALJ'S FINDINGS

20 The ALJ found at step one that Plaintiff has not engaged in
21 substantial gainful activity since her alleged onset date, April
22 1, 2002. (AR 23). At step two, the ALJ determined that Plaintiff
23 had the following severe impairments: a depressive disorder, a
24 generalized anxiety disorder, a personality disorder mixed, a
25 substance abuse disorder and asthma. (AR 23). The ALJ noted that
26 while Plaintiff had been diagnosed with obstructive sleep apnea,
27 regular use of a C-PAP machine improved her symptoms. (AR 24).
28 In addition, while Plaintiff complained of significant hearing

1 loss in both ears, Plaintiff failed to provide medical records
2 which demonstrate a hearing impairment. (AR 24). The ALJ thus
3 concluded that the reported sleep apnea did not constitute a
4 severe impairment and that Plaintiff did not have a severe
5 impairment related to her hearing. (AR 24).

6 After considering the record, the ALJ found that Plaintiff
7 had the residual functional capacity ("RFC") to perform medium
8 exertion work. (AR 24). The ALJ determined that Plaintiff could
9 occasionally lift or carry up to 50 pounds, frequently lift and
10 carry up to 25 pounds, and stand or walk up to six hours in an
11 eight-hour workday, with intermittent sitting. (AR 24). He
12 indicated that Plaintiff had good use of her arms and hands for
13 grasping, holding and turning objects, was capable of performing
14 light and sedentary work, and, because of asthma, should avoid
15 dust, fumes and gases. (AR 24). The ALJ concluded that Plaintiff
16 should have only occasional, superficial interaction with the
17 general public and superficial contact with co-workers. (AR 24-
18 25). The ALJ further determined that Plaintiff's symptoms from
19 her medications would not prevent her from functioning at the
20 levels he indicated. (AR 25).

21 At step four of the sequential evaluation process, the ALJ
22 found that, consistent with the opinions of the vocational expert
23 and in comparing Plaintiff's RFC with the physical and mental
24 demands of her past relevant work, Plaintiff was able to perform
25 her past relevant work as a kitchen helper/dishwasher and a food
26 wrapper. (AR 29). Accordingly, the ALJ determined, at step four
27 of the sequential evaluation process, that Plaintiff was not
28 disabled within the meaning of the Act. (AR 29-30).

ISSUES

Plaintiff contends that the Commissioner erred as a matter of law. Specifically, she argues that:

1. The ALJ's assessment of Plaintiff's mental limitations was not in conformity with the evidence of record;

2. The ALJ's opinion that Plaintiff is not credible is not supported by the record; and

3. The ALJ's hypothetical presented to the vocational expert was not complete.

This Court must uphold the Commissioner's determination that Plaintiff is not disabled if the Commissioner applied the proper legal standards and there is substantial evidence in the record as a whole to support the decision.

DISCUSSION**I. RFC Determination**

Plaintiff asserts that the ALJ failed to properly assess her RFC. (Ct. Rec. 14 at 8-10). Plaintiff argues that limitations assessed by Drs. Everhart and Michels reflect more serious limitations than those given by medical expert, Dr. Bostwick. (Ct. Rec. 14 at 9).

RFC is defined as the most one can still do despite the individual's limitations. 20 C.F.R. §§ 404.1545(a)(1), 416.945(a)(1). In making his RFC determination, the ALJ considers Plaintiff's symptoms, including pain, and the extent to which these symptoms can be reasonably accepted as consistent with the objective medical evidence and other evidence of record. The ALJ

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1 also considers the opinions of acceptable medical sources which
2 reflect the judgment about the nature and severity of the
3 impairments and resulting limitations.

4 The ALJ found that Plaintiff had the RFC to perform medium
5 exertion work. (AR 24). The ALJ determined that Plaintiff could
6 occasionally lift or carry up to 50 pounds, frequently lift and
7 carry up to 25 pounds, and stand or walk up to six hours in an
8 eight-hour workday, with intermittent sitting. (AR 24). He
9 concluded that Plaintiff should have only occasional, superficial
10 interaction with the general public and superficial contact with
11 co-workers, and that Plaintiff's symptoms from her medications
12 would not prevent her from functioning at the levels indicated.
13 (AR 24-25). This RFC determination is supported by the weight of
14 the evidence of record.

15 Plaintiff was examined by Joyce Everhart, Ph.D., on June 6,
16 2003. (AR 123-131). At the outset, it is significant to note
17 that while the check-box psychological/psychiatric evaluation form
18 Dr. Everhart filled out appears to indicate some greater
19 limitations than those accounted for in her narrative report (AR
20 128-131), a check-box form is entitled to little weight. *Crane v.*
21 *Shalala*, 76 F.3d 251, 253 (9th Cir. 1996) (stating that the ALJ's
22 rejection of a check-off report that did not contain an
23 explanation of the bases for the conclusions made was
24 permissible). Certainly, the doctor's narrative explanation which
25 describes Plaintiff's limitations in detail is entitled to more
26 weight than boxes checked on an accompanying form. Dr. Everhart

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1 also indicated on the psychological/psychiatric evaluation form
2 that Plaintiff's reported regular use of marijuana in conjunction
3 with her prescribed medication affected the assessment of
4 Plaintiff's functional limitations on the form (AR 130) and noted
5 that with medication compliance, Plaintiff's functioning ability
6 should "substantially improve" (AR 131).

7 With respect to Dr. Everhart's narrative report, Plaintiff
8 reported she was bipolar, had sleep apnea, had a history of
9 substance abuse, including marijuana, meth and crank, reportedly
10 in remission, and had a nicotine addiction. (AR 123). Plaintiff
11 also indicated that she continued to use marijuana. (AR 124).
12 Plaintiff reported she was fired from her last job when she
13 overslept and that a job at Davis Island in Florida ended because
14 she moved. (AR 124). Plaintiff stated, "I know nothing more than
15 how to cook, clean and take care of kids." (AR 124-125). Dr.
16 Everhart opined that Plaintiff appeared to have no desire to work
17 outside the home and would like to be on SSI. (AR 127). Dr.
18 Everhart indicated that Plaintiff's "greatest desire" was to be on
19 SSI to allow her to have a regular, more substantial income. (AR
20 127).

21 Dr. Everhart found that Plaintiff had good long-term memory,
22 was aware of current events, does not need in-home care to perform
23 her activities of daily living and can take care of her family,
24 including doing chores, doing laundry and cooking. (AR 125). Dr.
25 Everhart diagnosed a bipolar disorder as per history from medical
26 records, although not confirmed by the MMPI, substance abuse
27 (marijuana on a regular basis by self-report), and a personality
28 disorder, NOS, with antisocial and dependent features, gave

1 Plaintiff a Global Assessment of Functioning ("GAF") score of 65¹
2 and indicated that it was unclear how the interactions of her
3 regular marijuana use and the prescribed medications were
4 affecting her ability to function. (AR 127-128).

5 While Dr. Everhart noted no clear evidence of malingering (AR
6 125), Dr. Everhart indicated that there were some questions with
7 regard to Plaintiff's credibility in the area of what particular
8 types of drugs she may or may not have been using (AR 127). Dr.
9 Everhart opined that Plaintiff's pace was adequate and that
10 Plaintiff should be able to do repetitive jobs with little or no
11 problem. (AR 127). She determined that Plaintiff's concentration
12 and persistence appeared to be within normal limits, and,
13 intellectually, she appeared to be functioning within the normal
14 range. (AR 127). Dr. Everhart indicated that Plaintiff should be
15 able to make adequate progress in an educational and/or work-
16 related training program. (AR 127).

17 The ALJ accorded Dr. Everhart's opinion significant weight
18 because of the lack of any contradictory records and the fact that
19 testing supported her opinions. (AR 27).

20 On March 3, 2005, Plaintiff was examined by Paul Michels,
21 M.D. (AR 213-219). Dr. Michels noted it seemed Plaintiff only
22 visited mental health professionals for required evaluations; for
23 example, when Plaintiff was trying to get welfare benefits. (AR
24 215). With respect to her last employment, Plaintiff reported to
25 Dr. Michels that she decided to quit when confronted about not

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27 ¹A GAF of 70-61 is characterized as: "Some mild symptoms
28 or some difficulty in social, occupational, or school
functioning, but generally functioning pretty well." DIAGNOSTIC
AND STATISTICAL MANUAL OF MENTAL DISORDERS 12 (3d ed. Rev. 1987).

1 showing up for work after oversleeping. (AR 216). She indicated
2 that she had never been fired, but would often walk off jobs
3 feeling that she was being treated poorly. (AR 216). Plaintiff
4 indicated that she continued to use marijuana on a daily basis,
5 three or four times a day, and has a history of drinking alcohol
6 excessively. (AR 216). Plaintiff reported that she dresses and
7 bathes herself independently, prepares her own meals and meals for
8 everyone in the household and does most of the household chores
9 with help from her daughters. (AR 217). Dr. Michels diagnosed
10 marijuana abuse, a depressive disorder, NOS, a generalized anxiety
11 disorder and a borderline personality disorder and gave Plaintiff
12 a GAF score of 55.² (AR 218). Dr. Michels indicated that chronic
13 marijuana use can contribute to and perpetuate depressive symptoms
14 and can also make antidepressant medication treatment less
15 effective. (AR 218). He opined that Plaintiff's focus and
16 concentration appeared adequate, but her pace and persistence
17 seemed poor. (AR 219). He indicated that although Plaintiff may
18 have the intellectual capacity to understand, remember and follow
19 both complex and simple instructions, her affective instability
20 and maladaptive coping mechanisms may create occasional to
21 frequent difficulties completing specific tasks in a timely or
22 consistent manner and that interactions with others would likely
23 pose great difficulty. (AR 219).

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27 ²A GAF of 60-51 reflects: Moderate symptoms or moderate
28 difficulty in social, occupational, or school functioning. See
DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS 32 (4th ed. 1994).

1 The ALJ indicated that Dr. Michels' opinion was based on an
2 interview with no objective testing and; therefore, was based
3 solely on Plaintiff's subjective complaints³ interpreted in the
4 psychiatric setting. (AR 27). The ALJ also noted that Dr.
5 Michels' assessed level of impairment was inconsistent with the
6 opinions of Drs. Everhart and Bostwick. (AR 27).

7 The ALJ accorded greater weight to the opinions of Drs.
8 Everhart and Bostwick. (AR 27). Specifically, while Dr. Michels
9 opined that Plaintiff was limited in completing tasks and in
10 reacting to stress (AR 219), Dr. Everhart, after clinical testing,
11 determined that Plaintiff appeared to be emotionally stable, her
12 pace was adequate and her concentration and persistence appeared
13 to be within normal limits (AR 127). Dr. Bostwick also dismissed
14 Dr. Michels' opinion regarding Plaintiff's pace and persistence
15 finding that actual testing placed her concentration, attention
16 and persistence within normal limits. (AR 305). The ALJ properly
17 discounted Dr. Michels' medical report. (AR 27).

18 Medical expert Allan D. Bostwick, Ph.D., testified at the
19 administrative hearing held on March 8, 2007. (AR 297-306). Dr.
20 Bostwick indicated that the record contained only two mental
21 health reports, those of Drs. Everhart and Michels. (AR 298). He
22 stated that it was difficult to evaluate Plaintiff without drugs
23 and alcohol, because it appeared to be continuous throughout the
24 record. (AR 300). Dr. Bostwick opined that, without drugs and
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26 ³As determined in Section II, below, the ALJ did not err
27 by finding Plaintiff not entirely credible. *See infra*. A
28 physician's opinion may be disregarded when it is premised on
the properly rejected subjective complaints of Plaintiff.
Tonapetyan v. Halter, 242 F.3d 1144, 1149 (9th Cir. 2001).

1 alcohol Plaintiff would have a moderate limitation with her
2 ability to interact appropriately with the general public but
3 would otherwise have no limitations or no significant limitations
4 with her functioning ability. (AR 301-302). Taking drug and
5 alcohol use into consideration, Dr. Bostwick indicated that the
6 limitations mostly increased by one step. (AR 302-303). As noted
7 above, Dr. Bostwick also discounted Dr. Michels' opinion that
8 Plaintiff's pace and persistence seemed poor indicating that
9 actual testing placed her concentration, attention and persistence
10 within normal limits. (AR 305). The ALJ accorded Dr. Bostwick's
11 opinion significant weight, indicating that he had the opportunity
12 to review all of the record evidence. (AR 27-28).

13 It is the responsibility of the ALJ to resolve conflicts in
14 medical testimony and resolve ambiguities. *Saelee v. Chater*, 94
15 F.3d 520, 522 (9th Cir. 1996). The Court thus has a limited role
16 in determining whether the ALJ's decision is supported by
17 substantial evidence and may not substitute its own judgment for
18 that of the ALJ even if it might justifiably have reached a
19 different result upon de novo review. 42 U.S.C. § 405(g).
20 Contrary to Plaintiff's arguments, the record does not support a
21 more restrictive RFC determination than as assessed by the ALJ in
22 this matter. The ALJ's reliance on the findings of the medical
23 expert and the opinion of Dr. Everhart, as consistent with the
24 credible evidence of record, was proper in this case. The ALJ's
25 RFC finding is supported by substantial record evidence and free
26 of error.

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II. Plaintiff's Credibility

Plaintiff argues that the ALJ erred by improperly rejecting Plaintiff's testimony without giving adequate reasons. (Ct. Rec. 14 at 10). The undersigned does not agree.

It is the province of the ALJ to make credibility determinations. *Andrews v. Shalala*, 53 F.3d 1035, 1039 (9th Cir. 1995). However, the ALJ's findings must be supported by specific cogent reasons. *Rashad v. Sullivan*, 903 F.2d 1229, 1231 (9th Cir. 1990). Once Plaintiff produces medical evidence of an underlying impairment, the ALJ may not discredit Plaintiff's testimony as to the severity of an impairment because it is unsupported by medical evidence. *Reddick v. Chater*, 157 F.3d 715, 722 (9th Cir. 1998) (citation omitted). Absent affirmative evidence of malingering, the ALJ's reasons for rejecting Plaintiff's testimony must be "clear and convincing." *Lester v. Chater*, 81 F.3d 821, 834 (9th Cir. 1995). "General findings are insufficient: rather the ALJ must identify what testimony is not credible and what evidence undermines the claimant's complaints." *Lester*, 81 F.3d at 834; *Dodrill v. Shalala*, 12 F.3d 915, 918 (9th Cir. 1993). The ALJ may consider at least the following factors when weighing Plaintiff's credibility: Plaintiff's reputation for truthfulness, inconsistencies either in her testimony or between her testimony and her conduct, Plaintiff's daily activities, Plaintiff's work record, and testimony from physicians and third parties concerning the nature, severity, and effect of the symptoms of which she complains. *Thomas v. Barnhart*, 278 F.3d 947, 958-959 (9th Cir.

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1 2002). If the ALJ's credibility finding is supported by
2 substantial evidence in the record, the court must not engage in
3 second-guessing. *Id.* at 959.

4 The ALJ considered the evidence of record and concluded that
5 Plaintiff's medically determinable impairments could reasonably be
6 expected to produce the alleged symptoms, but that Plaintiff's
7 statements concerning the intensity, persistence and limiting
8 effects of these symptoms were not entirely credible. (AR 26).

9 The ALJ discussed the evidence of record and determined that
10 Plaintiff's testimony was not fully credible. (AR 26).

11 As indicated by the ALJ, it is significant that there is no
12 testimonial or documentary evidence supporting Plaintiff's claim
13 that she is not able to work due to her mental impairments. (AR
14 26). To the contrary, Dr. Everhart opined that Plaintiff should
15 be able to do repetitive jobs with little or no problem. (AR
16 127). She determined that Plaintiff should be able to make
17 adequate progress in an educational and/or work-related training
18 program. (AR 127). In addition, as noted by the ALJ, Plaintiff's
19 employment relationships appeared to end mostly on Plaintiff's own
20 volition rather than due to her impairments. (AR 26). The record
21 reflects that Plaintiff ended one job because she moved and walked
22 off or quit other jobs. (AR 26, 216, 310, 318).

23 The ALJ also noted inconsistencies in Plaintiff's statements.
24 (AR 26). Inconsistencies in a disability claimant's testimony
25 supports a decision by the ALJ that a claimant lacks credibility.
26 *Nyman v. Heckler*, 779 F.2d 528, 531 (9th Cir. 1986). With respect
27 to her last employment, Plaintiff testified at the administrative
28 hearing that she left her last job after being sexually harassed.

1 (AR 310). However, Plaintiff reported to Dr. Michels that she
2 decided to quit her last job when confronted about not showing up
3 for work after oversleeping. (AR 216). She indicated to Dr.
4 Michels that she has never been fired. (AR 216). Yet, Plaintiff
5 reported to Dr. Everhart that she was fired from her last job when
6 she overslept. (AR 124). These inconsistent statements were
7 properly noted by the ALJ in assessing Plaintiff's credibility.
8 (AR 26).

9 Furthermore, despite the urging by Plaintiff's primary care
10 providers, Plaintiff did not seek care from a mental health
11 professional. (AR 26). Noncompliance with medical care or
12 unexplained or inadequately explained reasons for failing to seek
13 medical treatment cast doubt on a claimant's subjective
14 complaints. 20 C.F.R. §§ 404.1530, 426.930; *Fair v. Bowen*, 885
15 F.2d 597, 603 (9th Cir. 1989). On May 31, 2001, David Weaver,
16 ARNP, stated that he "[w]ould like to still have her get [the]
17 benefit of [a] psychiatric evaluation with medication
18 recommendation." (AR 158). On October 4, 2001, Mr. Weaver
19 indicated that Plaintiff would benefit from an evaluation by a
20 psychiatrist, gave Plaintiff a note asking for a referral to
21 Community Mental Health, and requested that Plaintiff make contact
22 with them. (AR 160). On April 8, 2002, Douglas R. Gwinn, M.D.,
23 reported that Plaintiff had still not seen a psychiatrist and
24 stated that "she needs to get into Spokane County Mental Health
25 and be evaluated." (AR 168). On May 14, 2003, Mr. Weaver
26 requested that Plaintiff follow up with a psychiatric evaluation.
27 (AR 192). He indicated that "I really would still like her to
28 have a psychiatry evaluation." (AR 192). Nevertheless, Plaintiff

1 apparently did not follow through with the requests by her primary
2 care providers to be seen by a mental health professional.

3 While there is no affirmative evidence of malingering in the
4 record, it is significant to note that Dr. Everhart indicated
5 there were some questions with regard to Plaintiff's credibility
6 in the area of what particular types of drugs she may or may not
7 have been using. (AR 127). Furthermore, Plaintiff reported to
8 Dr. Everhart that her "greatest desire" was to be on SSI to allow
9 her to have a regular, more substantial income. (AR 127). Dr.
10 Everhart opined that Plaintiff appeared to have no desire to work
11 outside the home and would like to be on SSI. (AR 127). The
12 Ninth Circuit has recognized that the ALJ may properly consider
13 the issue of motivation in assessing credibility. *Matney v.*
14 *Sullivan*, 981 F.2d 1016, 1020 (9th Cir. 1992).

15 Finally, the ALJ also addressed Plaintiff's testimony
16 describing her daily activities. (AR 26). It is well-established
17 that the nature of daily activities may be considered when
18 evaluating credibility. *Fair v. Bowen*, 885 F.2d 597, 603 (9th
19 Cir. 1989). Inconsistent with Plaintiff's allegation of
20 disability, Plaintiff testified that she lived in a home with her
21 boyfriend and 12-year-old daughter and reported doing the cooking,
22 and, occasionally with some help, the household chores including
23 vacuuming, taking care of the pets,⁴ doing the laundry and doing
24 the grocery shopping. (AR 26).

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26 ⁴The undersigned notes the record reflects that at the time
27 of the administrative hearing Plaintiff cared for two dogs, 12
28 puppies, and two cats. (AR 307-308, 314). The record also
shows that she cared for other household pets during the
relevant time period, including fish and birds. (AR 217).

1 After reviewing the record, the undersigned finds that the
2 reasons provided by the ALJ for finding Plaintiff not fully
3 credible, as outlined above, are clear and convincing and
4 supported by substantial evidence in the record. Accordingly, the
5 ALJ did not err by concluding that Plaintiff's testimony was not
6 entirely credible in this case.

7 **III. Step Four Determination**

8 Plaintiff lastly contends that the ALJ's step four analysis
9 is unsupported because the hypothetical question posed to the
10 vocational expert was incomplete. (Ct. Rec. 14 at 11).

11 Social Security Ruling ("SSR") 82-61 provides that, pursuant
12 to 20 C.F.R. § 404.1520(e) and § 416.920(e), a claimant will be
13 found not disabled when it is determined she retains the RFC to
14 perform either the actual functional demands and job duties of a
15 particular past relevant job, or the functional demands and job
16 duties of the occupation as generally required by employers
17 throughout the national economy. SSR 82-61. "If a claimant shows
18 that he or she cannot return to his or her previous job, the
19 burden of proof shifts to the Secretary to show that the claimant
20 can do other kinds of work." *Embrey v. Bowen*, 849 F.2d 418, 422
21 (9th Cir. 1988). Plaintiff thus has the initial burden of
22 demonstrating she cannot perform her past relevant work. *Hoffman*
23 *v. Heckler*, 785 F.2d 1423, 1425 (9th Cir. 1986). Only after
24 Plaintiff establishes her inability to perform her previous work
25 does the burden shift to the Commissioner to show that Plaintiff
26 can do less demanding substantial gainful work which exists in the
27 national economy. *Hoffman*, 785 F.2d at 1425.

28 ///

1 Regarding the findings that must be made at step four, SSR
2 82-62 provides:

3 In finding that an individual has the capacity to perform a
4 past relevant job, the determination or decision must contain
5 among the findings the following specific findings of fact:
6 (1) A finding of fact as to the individual's residual
7 functional capacity (RFC); (2) A finding of fact as to the
8 physical and mental demands of the past job/occupation;
9 (3) A finding of fact that the individual's RFC would permit
10 a return to his or her past job or occupation.

11 SSR 82-62.

12 As determined above, the ALJ's RFC finding was proper in this
13 case. *See supra*. Accordingly, the ALJ appropriately concluded
14 that Plaintiff was capable of performing at least medium exertion
15 level work with only occasional, superficial interaction with the
16 general public and superficial contact with co-workers. (AR 24-
17 25).

18 Vocational expert Dr. Joseph A. Moisan testified that
19 Plaintiff's past work as a kitchen helper/dishwasher was medium
20 exertion level work and her past work as a food wrapper was light
21 work. (AR 323). Based on a hypothetical which included the
22 limitations assessed by the ALJ in this case, the vocational
23 expert testified that the individual would be capable of
24 performing Plaintiff's past relevant work as a kitchen
25 helper/dishwasher and a food wrapper. (AR 323-324).

26 At step four of the sequential evaluation process, the ALJ
27 found that, based on Plaintiff's RFC and the vocational expert's
28 testimony, Plaintiff was capable of performing her past relevant
work as a kitchen helper/dishwasher and a food wrapper. (AR 29).
Consistent with the vocational expert's testimony, the ALJ made a
finding that Plaintiff's past relevant work as a kitchen
helper/dishwasher was medium exertion work and her past work as a

1 food wrapper was light exertion level work. (AR 29, 323). The
2 ALJ properly compared Plaintiff's RFC with the demands of her past
3 work and concluded that Plaintiff would be able to perform the
4 jobs as typically performed. (AR 29). The ALJ's step four
5 findings were consistent with the directives of SSR 82-62. The
6 undersigned finds that the ALJ's step four determination is
7 without error.

8 **CONCLUSION**

9 Having reviewed the record and the ALJ's conclusions, the
10 Court finds that the ALJ's decision is supported by substantial
11 evidence and free of legal error. Plaintiff is thus not disabled
12 within the meaning of the Social Security Act. Accordingly,

13 **IT IS ORDERED:**

14 1. Plaintiff's Motion for Summary Judgment (**Ct. Rec. 13**)
15 is **DENIED**.

16 2. Defendant's Motion for Summary Judgment (**Ct. Rec. 17**)
17 is **GRANTED**.

18 3. The District Court Executive is directed to enter
19 judgment in favor of Defendant, file this Order, provide a copy to
20 counsel for Plaintiff and Defendant, and **CLOSE** this file.

21 **IT IS SO ORDERED.**

22 **DATED** this 23rd day of June, 2008.

23 _____
24 *S/James P. Hutton*

25 JAMES P. HUTTON
26 UNITED STATES MAGISTRATE JUDGE
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